2011 IL App (1st) 102711-U

No. 1-10-2711

FIFTH DIVISION
December 30, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MARIA CUMBA,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 07 L 3846
	)	
MENARD, INC.,	)	Honorable
	)	Kathy M. Flanagan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Epstein and Justice McBride concurred in the judgment.

ORDER

HELD: Because defendant's notice of appeal was prematurely filed under the provisions of Illinois Supreme Court Rule 272, we find we do not have jurisdiction to consider the issues raised in this appeal.

¶ 1 Plaintiff Maria Cumba filed a slip and fall negligence action against defendant Menard, Inc. on April 13, 2007. On January 12, 2009, the parties agreed to settle the matter by

mediation and plaintiff entered a voluntary order dismissing the action with prejudice. On April 12, 2010, plaintiff filed a petition to set aside the dismissal order under section 2-1401 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2010)). The trial court initially granted plaintiff's petition on July 28, 2010. On August 17, 2010, the trial court orally ruled that defendant's motion to reconsider would be denied with a written order to follow. On September 14, 2010, defendant appealed the court's order granting plaintiff's section 2-1401 petition. On October 5, 2010, however, the trial court issued a written order granting defendant's motion for reconsideration. The court then ordered that a full evidentiary hearing be conducted as to the controverted facts raised in the petition, and that defendant dismiss its pending appeal pursuant to Illinois Supreme Court Rule 309.

¶ 2 On appeal, defendant contends the trial court abused its discretion in granting plaintiff's section 2-1401 petition. Defendant also contends the trial court's October 5 written order granting defendant's motion to reconsider and ordering a full evidentiary hearing is void because the court lost jurisdiction over the matter when defendant filed its notice of appeal on September 14. For the reasons that follow, we dismiss defendant's appeal based on a lack of jurisdiction.

¶ 3 BACKGROUND

¶ 4 Plaintiff filed a negligence action against defendant on April 13, 2007, alleging she was injured when she slipped on a foreign substance and fell while shopping at one of defendant's stores in Chicago. On January 12, 2009, the parties agreed to settle the matter by mediation and plaintiff entered a voluntary order dismissing the action with prejudice. Thereafter, the parties could not reach an agreement on several conditions of the proposed mediation, including whether mediation would be binding or nonbinding on the parties.

¶ 5 On April 12, 2010, plaintiff filed a petition under section 2-1401 of the Code to set aside the voluntary dismissal order. In an affidavit attached in support of the motion, plaintiff's attorney averred that at the time plaintiff dismissed her action, the parties had agreed to participate in binding mediation; that plaintiff dismissed her action based solely upon this agreement; and that in the fall of 2009, defendant's counsel, Ms. Parker, told plaintiff's counsel that defendant would not participate in binding mediation. Plaintiff alleged in the petition itself that she had asserted a meritorious claim against defendant, and that she had prosecuted the claim diligently in the underlying action. As to her due diligence in filing the section 2-1401 petition, plaintiff alleged that "all of the circumstances attendant upon

entry of the judgment" provided her with a "reasonable excuse" for failing to file her petition immediately after the fall 2009 communique from defendant's counsel explaining defendant would not agree to binding mediation.

¶ 6 In response, defendant argued that it never agreed to binding mediation; that plaintiff should have sought to vacate the January 12 dismissal order within 30 days, as provided for under section 2-1203(a) of the Code (735 ILCS 5/2-1203(a) (West 2008)); and that even assuming plaintiff's allegations were true, plaintiff had not established due diligence as required under section 2-1401 of the Code because plaintiff failed to explain why she waited eight months to file her petition after learning defendant would not agree to binding mediation in fall 2009

¶ 7 The trial court granted plaintiff's section 2-1401 petition, finding there was no question plaintiff had shown a meritorious claim and due diligence in pursuing that claim. With regard to whether plaintiff had shown due diligence in filing the section 2-1401 petition itself, the court noted plaintiff had provided no details about the eight-month time frame between when plaintiff learned in fall 2009 that defendant did not wish to participate in binding mediation and when plaintiff filed the petition in March 2010. The court found its was "left to surmise that the Plaintiff's counsel believed that the Defendant's attorney might

change her client's mind during that time."

¶ 8 On August 10, 2010, defendant filed a motion to reconsider the trial court's order. On August 17, 2010, the parties appeared before the court for a case management conference. When defendant's counsel, Christian Novay, asked the court when it expected to rule on the motion to reconsider, the court said it planned to issue a written ruling that had not yet been prepared. The matter was then set over for a case management conference on August 26, 2010.

¶ 9 On August 26, 2010, Novay was unable to attend the case management conference. Lisa Ackerman appeared in his place. When Ackerman arrived to court, the case management conference had already been completed. Ackerman waited until the court finished the rest of its call and was given a copy of the order entered during the status hearing. Ackerman was not told by the court that a decision had been reached with regards to defendant's motion to reconsider. Ackerman provided Novay with a copy of the order entered that day, which indicates the parties are to set a "firm date" for the deposition of defendant's expert and sets the case over to September 9, 2010. The motion for reconsideration is not mentioned in the August 26 status order.

¶ 10 On September 9, 2010, Novay appeared on defendant's behalf at the case management conference. When Novay asked the court

when it expected to rule on the motion to reconsider, the court said it had orally denied the motion during the August 26 case management conference. The court told the parties that although she had already orally denied the motion to reconsider, it would be formalizing its ruling in a written opinion to substantiate the record. Plaintiff's counsel then showed Novay his copy of the court's August 17 order, which had the word "denied" written in red ink and in Judge Flanagan's handwriting immediately beneath the notation that the matter was being set over to August 26 for a ruling on the motion to reconsider. The court then set the case over for status to September 14, 2010.

¶ 11 At 9 a.m. on September 14, 2010, the parties appeared before the court for a case management conference. When defendant's counsel asked the court about the status of the written decision denying defendant's motion to reconsider, the court said it would issue a written opinion specifying the reasons for its denial at a later date. The case was then set over to September 28, 2010, for issuance of a written opinion addressing the motion to reconsider. The court's September 14 order contains a notation stating "Court to tender written ruling on defendant's motion for reconsideration and response to defendant's written response to Court's inquiry."

¶ 12 Defendant filed a notice of appeal on September 14, 2010,

which indicates it was file-stamped by this court's clerk at 10:56 a.m. The notice of appeal states:

> "It is unclear when or if the circuit court denied defendant's motion to reconsider. A copy of the circuit court's case management order of August 17, 2010 faxed to defendant's counsel on September 10, 2010 by plaintiff's counsel has the word "denied" written at Line 12 immediately beneath the notation that defendant's motion to reconsider was pending and scheduled for hearing at the case management conference of August 26, 2010. It is not known when the 'denied' notation was made on this copy of the [August 16] order. Defense counsel was present at the August 17, 2010 case management conference and the circuit court did not orally rule on the motion to reconsider. Further, the 'denied' notation is not made on either defendant's file copy of the August 17, 2010 order (Exh. C) obtained from the circuit court clerk that day or on the circuit court's copy of the

> order obtained by defense counsel on September 13, 2010 (Exh. D). In order to preserve its appeal rights, defendant hereby assumes that its timely-filed motion to reconsider the July 28, 2010 order was denied on August 17, 2010."

¶ 13 During the case management conference on September 28, 2010, defendant advised the court that it had filed a notice of appeal on September 14 seeking review of the court's July 28 order granting plaintiff's section 2-1401 petition. When defendant's counsel asked about the status of the written order so that it could be included in the record on appeal, the court said the written order had not yet been prepared. The court then set the case over to October 5, 2010, for issuance of its written order and "status on appeal."

¶ 14 On October 5, 2010, the court entered a written order finding defendant's motion for reconsideration would now be granted. The court found the affidavits submitted by the parties conflicted with each other and called into question the credibility of the attorneys, thus requiring a full evidentiary hearing be held. The court also found defendant's appeal was "premature" given that no evidentiary hearing was held prior to entry of the July 28 order. The July 28 order granting the

plaintiff's section 2-1401 petition was vacated and defendant was ordered to dismiss its appeal as moot, pursuant to Supreme Court Rule 309.

¶ 15 On October 12, 2010, defendant filed a motion with this court to set aside the circuit court's October 5 order for lack of jurisdiction and to stay all circuit court proceedings pending resolution of this appeal. We denied defendant's motion to set aside the court's order but granted the motion to stay proceedings pending resolution of this appeal.

¶ 16 ANALYSIS

¶ 17 Defendant contends the circuit court had no jurisdiction to enter the October 5 order granting defendant's motion to reconsider, rendering the order void. Specifically, defendant contends that once it filed its notice of appeal on September 14, 2010, jurisdiction was transferred from the trial court to the appellate court *instanter*. See *Physicians Insurance Exchange v. Jennings*, 316 Ill. App. 3d 443, 453 (2000). In support, defendant notes it is undisputed that the court "orally" denied defendant's motion to reconsider at the August 26, 2010, case management conference. Defendant also notes its is undisputed that the court memorialized its order in writing by writing "denied" on plaintiff's counsel's copy of the August 17, 2010, case management order. Defendant contends the trial court's

actions in denying the motion to reconsider on August 26 were sufficient to constitute an appealable final judgment in the matter.

¶ 18 Plaintiff counters that defendant's September 14 notice of appeal was premature because the trial court had specifically informed the parties that it would also enter a written order addressing the motion to reconsider, which had not yet been prepared or filed when defendant filed its notice.

¶ 19 We recognize the filing of a notice of appeal transfers jurisdiction from the trial court to the appellate court *instanter*. *Physicians Insurance Exchange*, 316 Ill. App. 3d at 453. After a notice of appeal is properly filed, the trial court cannot enter an order that would modify the judgment or its scope. *Id*. The trial court only retains jurisdiction to determine matters collateral or incidental to the judgment appealed from. *Id*.

¶ 20 It is also well-settled that only final judgments are appealable, however. *Northern Illinois Gas Co. v. Martam Construction Co.*, 240 Ill. App. 3d 988, 990 (1993). "Final orders are those that resolve a separate and distinct part of the controversy, conclude the litigation on the merits, or dispose of the parties' rights in relation to part or all of the controversy." *Physicians Insurance Exchange*, 316 Ill. App. 3d at

454-55. Moreover, Illinois Supreme Court Rule 303(a)(2) provides that a notice of appeal filed before entry of the order disposing of the last pending postjudgment motion has no effect and must be withdrawn by the party who filed it by moving for dismissal pursuant to Supreme Court Rule 309. Ill. S. Ct. R. 303(a)(2) (eff. June 4, 2008); Ill. S. Ct. R. 309 (eff. Feb. 1, 1981); *Id*. ¶ 21 Although not specifically addressed by the parties, we note Illinois Supreme Court Rule 272 directly controls the jurisdictional issue presented here. Rule 272 provides:

> "If at the time of announcing final judgment the judge requires the submission of a form of written judgment to be signed by the judge or if a circuit court rule requires the prevailing party to submit a draft order, the clerk shall make a notation to that effect and the judgment becomes final only when the signed judgment is filed. If no such signed written judgment is to be filed, the judge or clerk shall forthwith make a notation of judgment and enter the judgment of record promptly, and the judgment is entered at the time it is entered of record." Ill. S. Ct. R. 272 (eff. Nov. 1, 1990)."

¶ 22 Rule 272 is intended to eliminate confusion as to the finality of judgments and resolve questions of timeliness of appeals where there is an oral announcement of judgment from the bench. *Northern Illinois Gas Co.*, 240 Ill. App. 3d at 991. "In the time between the announcement of the judgment and the entry of the contemplated written and signed formal order, a party may not enforce the judgment, attach the judgment by motion, or appeal from the judgment." *Id* (citing *Ferguson v. Riverside Medical Center*, 111 Ill. 2d 436, 441 (1985)). "In such cases, the filing of a notice of appeal before the entry of the signed written order does not confer jurisdiction on an appellate court." *Id*.

¶ 23 A number of cases have similarly interpreted Rule 272's provisions. See, *e.g.*, *Stoermer v. Edgar*, 119 Ill. App. 3d 514, 514 (1983) ("[Under Rule 272,] the trial court's handwritten memorandum indicated that a formal order would be entered at a later time. A memorandum signed by the court cannot be deemed to be the judgment of record; it is but a direction to enter judgment or an indication of what judgment will be. A notice of appeal filed before the written final order is premature and does not confer jurisdiction on the appellate court."); *Loveless v. Loveless*, 3 Ill. App. 3d 967, 971-72 (1972) (where an order was entered on the docket on February 10 with a notation of a written

order to follow and the written order was not filed until April 16, the fact that a notice of appeal was filed on March 2 did not divest the trial court of jurisdiction because at the time notice was filed there was not final appealable order.); *Davidson Masonry v. J.L. Wroan and Sons, Inc.*, 2 Ill. App. 3d 524, 526-27 (1971) (a judgment was entered on the docket on May 7 with a notation that a written order would follow. A notice of appeal was filed on June 5, but the written order was not filed until July 23. The court held that at the time notice of appeal was given there was no final and appealable order, and, therefore, there was no basis for appellate jurisdiction.).

¶ 24 Here, it is undisputed that the trial court orally announced it would be denying defendant's motion to reconsider on August 26, 2010. The court also apparently wrote the word "denied" on plaintiff's copy of the August 17 status order, though defendant noted in its notice of appeal that defense counsel's copy of the order and the trial court's file copy did not contain such a notation. Both parties concede they were specifically informed at the August 17 status hearing that the court intended to enter a formal written order with regards to the motion to reconsider, but that it had not yet prepared the order. On September 9, 2010, with both parties in attendance, the court also apparently advised the parties that while it had already orally denied

defendant's motion to reconsider, it would be formalizing its ruling in a written opinion to substantiate the record. Accordingly, we find the record reflects both parties were clearly aware that the court intended to file a formal written order disposing of the motion to reconsider at a later date.

¶ 25 Nothing in the record indicates the trial court changed its mind that a formal written order disposing of the motion would be entered prior to when defendant filed its notice of appeal on September 14, 2010. In fact, we note that at the 9 a.m. status hearing on September 14, 2010, the trial court again specifically informed defendant's counsel that it intended to file a written order explaining its reasoning and disposing of the motion to reconsider, but that the written order had not yet been prepared and would be entered at a later date. The court's intention to file a formal written judgment disposing of the motion was also specifically memorialized in writing on the September 14 order itself–-"Court to tender written ruling on defendant's motion for reconsideration and response to defendant's written response to Court's inquiry." The circuit court's clear pronouncement that a written order would be entered in the case occurred prior to when defendant filed his notice of appeal at 10:56 a.m. on September 14, 2010.

¶ 26 Therefore, we find this case clearly falls under Rule 272's

provisions. See *Northern Illinois Gas Co.*, 240 Ill. App. 3d at 990-91. Although the trial court indicated orally that it would deny defendant's motion to reconsider during the August 26 and September 9 status hearings, the record reflects both parties were clearly made aware that the court also intended to enter a formal written order disposing of the motion. The court's written order disposing of the motion was not entered until October 5, 2010. Under Rule 272's provisions, it was the trial court's formal written order filed on October 5–-not the court's oral pronouncement and notation on plaintiff's copy of the August 17 status order–-that constituted the final judgment entered in this case. Because defendant's September 14 notice of appeal was prematurely filed, the filing of that notice did not deprive the trial court of jurisdiction over the matter and render the October 5 order void. *Id; Loveless*, 3 Ill. App. 3d at 971-72. Accordingly, we must dismiss defendant's appeal for lack of jurisdiction. *Id*.

¶ 27 CONCLUSION

¶ 28 We dismiss defendant's appeal based on a lack of jurisdiction to consider the issues raised herein.

¶ 29 Dismissed.